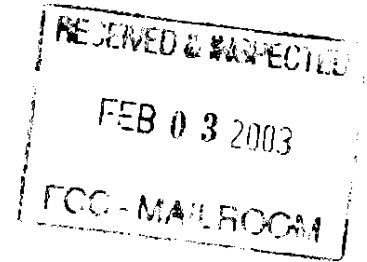


Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Request for Review of the)
Decision of the)
Universal Service Administrator by)
)
Electronic Classroom of Tomorrow) File No. SLD-226510
Columbus, Ohio)
)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)
)
Changes to the Board of Directors of the) CC Docket No. 97-21
National Exchange Carrier Association, Inc.)



ORDER

Adopted: February 26, 2003

Released: February 27, 2003

By the Wireline Competition Bureau:

1. Before the Telecommunications Access Policy Division is a Request for Review filed by the Electronic Classroom of Tomorrow (ECOT), Columbus, Ohio.¹ ECOT seeks review of a decision denying ECOT's Funding Year 2001 application for discounts under the schools and libraries universal service mechanism.² For the reasons set forth below, we dismiss the Request for Review without prejudice, pending final judgment in a related state court litigation.

2. On December 4, 2001, SLD issued a Funding Commitment Decision Letter denying all of ECOT's Funding Year 2001 funding requests on the grounds that ECOT was not an eligible school.³ ECOT now appeals that determination, arguing that it is eligible because it meets the eligibility requirements of section 254 of the Act.⁴

¹ *Request for Review of the Decision of the Universal Service Administrator By Electronic Classroom of Tomorrow*, CC Docket Nos. 96-45 and 97-21. Request for Review, filed January 3, 2001 (Request for Review).

² Letter from Schools and Libraries Division, Universal Setvice Administrative Company, to William Lager, Electronic Classroom of Tomorrow, dated December 4, 2001 (Funding Commitment Decision Letier).

Id.

⁴ See 47 U.S.C. § 254, added to the Communications Act of 1934 (47 U.S.C. §§ 151, *et seq.*) by the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (the Act). *See also* Request for Review

3. Only eligible schools and libraries may receive universal service funds under the schools and libraries universal service mechanism.⁵ To be eligible, a school must, among other things, meet the statutory definition of "elementary school" or "secondary school" contained in the Elementary and Secondary Education Act of 1965 (Education Act).⁶ Under the Education Act as amended, an "[e]lementary school" is defined as "a nonprofit institutional day or residential school that provides elementary education, as determined under State law." A "[s]econdary school" is defined as "a nonprofit institutional day or residential school that **provides** secondary education, as determined under State law, except that such term does not include any education beyond grade 12."⁸ Thus, the Commission looks to the applicable State law to determine whether an educational entity qualifies as an elementary or secondary school."

4. ECOT asserts that it satisfies the definition of elementary school and secondary school under the Education Act." In particular, it asserts that the Ohio Department of Education (ODE) has determined that ECOT may provide both elementary and secondary education.

5. We take notice of the fact that the validity of ECOT as a charter school under the Ohio statutes and Constitution is at issue in litigation currently pending in Ohio state court (Ohio State Court litigation)." Based on our review of the pleadings in the Ohio State Court litigation, including the Third Amended Complaint and the Answer filed by ECOT, we find that the best course of action is to dismiss the pending Request for Review without prejudice to the rights of ECOT to refile if, at the conclusion of the Ohio State Court litigation: ECOT determines that the relief requested here is consistent with the rulings in that action.¹² We find it likely that the

⁵ 47 C.F.R. § 54.501; see *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, **Report and Order**, 12 FCC Rcd 8776, 9066, para. 552 (1997) (*Universal Service Order*), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Errata, FCC 97-157 (rel. June 4, 1997), *affirmed in part*, *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (affirming *Universal Service Order* in part and **reversing and remanding** on unrelated grounds), *cert. denied*, *Celpage, Inc. v. FCC*, 120 S. Ct. 2212 (May 30, 2000), *cert. denied*, *AT&T Corp. v. Cincinnati Bell Tel. Co.*, 120 S. Ct. 2237 (June 5, 2000), *cert. dismissed*, *GTE Service Corp. v. FCC*, 121 S. Ct. 423 (November 2, 2000).

"47 U.S.C. §§ 254(h)(4), 254(h)(7)(A).

20 U.S.C. § 8801(14).

⁸ 20 U.S.C. § 8801(25).

⁹ *Cf. Hooks v. Clark County School District*, 228 F.3d 1036, 1040 (9th Cir. 2000) (*Hooks*) (analyzing materially identical definitions of "elementary school" and "secondary school" in Individuals with Disabilities Education Act (IDEA) and **concluding** that definition of "elementary school" and "secondary school" are thereby "committed to 'State law'")

¹⁰ Request for Review at 7.

¹¹ See generally *Ohio State Federation of Teachers v. Ohio State Board of Education*, 01 CVH 05 4457, Court of Common Pleas, Franklin County, Ohio.

"See OSFT Action, Third Am. Compl., filed April 24, 2002 (Third Amended Complaint); OSFT Action, Answer, filed May 9, 2002 (Answer). We note that, although the defendant named in the Third Amended Complaint is the "Educational Classroom of Tomorrow" (*italics added*): the Answer recognizes that this party and ECOT are the same. See Answer at 1

Ohio State Court litigation will significantly narrow the issues before us, specifically resolving the status of ECOT under Ohio state law. Permitting the state court to resolve this issue will therefore conserve Commission resources and avoid the possibility of inconsistent legal conclusions and a resulting federal-state conflict. Further, because the matter is purely one of state law, we conclude that the Ohio state court is the more appropriate forum for its resolution. This is consistent with Commission precedent in other contexts.¹³ Should ECOT find, after the matter is resolved, that renewal of the Request for Review is appropriate, it should refile its Request for Review within 60 days of judgment along with the appropriate court documents demonstrating resolution. In the event that ECOT ultimately refiles its Request for Review, it should address the impact of the Ohio State Court litigation on ECOT's entitlement to discounts under the schools and libraries universal service support mechanism.

6. ACCORDINGLY, IT IS HEREBY ORDERED, pursuant to authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the Request for Review filed by the Electronic Classroom of Tomorrow on January 3, 2001 is DISMISSED without prejudice to renew within 60 days of judgment in the Ohio State Court litigation.

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Matthey
Deputy Chief, Wireline Competition Bureau

¹³ See *Western Management Corporation*, Memorandum Opinion and Order, 16 FCC Rcd 840, 844 (Wireless Tel. Bur. 2001) (determining that the best course of action would be to dismiss all pending license applications without prejudice until state court litigation pertaining to applicant ownership under state contract law is resolved).